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Diamond T Utah, Inc., A Utah Corporation v. Travelers Indemnity Company, Pacific Finance, Inc., A Cor-Poration Authorized To Do Business In The State Of Utah : Brief of Respondent, Travelers Indemnity Company

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

DIAMOND T UTAH, INC., a Utah
corporation,

Plaintiff-Appellant

vs.

TRAVELERS INDEMNITY INSURANCE CO.,
a corporation authorized to do
business in the State of Utah,
PACIFIC FINANCE, INC.,
a corporation authorized to do
business in the State of Utah,

Defendants

BRIEF OF RESPONDENT
INDEMNITY INSURANCE CO.

Appeal from a Judgment of the
District Court of the County of Salt Lake,
Honorable Judge [Name]

SEP 23 1967

Filed, Supreme Court, Utah

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PACIFIC FINANCE, INC., a
corporation authorized to do
business in the State of Utah,

Defendants-Respondents.

Case No.
10951

BRIEF OF RESPONDENT, TRAVELERS
INDEMNITY COMPANY

STATEMENT OF THE CASE

This is an action on a contract of insurance between the plaintiff-appellant, Diamond T Utah, Inc., and the defendant-respondent, Travelers Indemnity Company.

DISPOSITION IN LOWER COURT

At pretrial defendant, Travelers Indemnity Company, moved to dismiss plaintiff's complaint. Plaintiff and defendant Travelers stipulated that there was no material issue of fact in the issue of liability on an insurance policy and that the depositions herein be published and that all of the written agreements of the parties hereto be made a part

of the record herein. The Court entered an order upon the stipulation and set a day for the submission of briefs and for oral argument on defendant's motion. The plaintiff-appellant, Diamond T Utah, amended the pretrial order to include a motion by it for summary judgment to be heard at the same time as Travelers Indemnity Company's motion. The Third Judicial District Court in and for Salt Lake County, State of Utah, heard the arguments of counsel and reviewed the pleadings and published depositions herein as provided in Rule 12(b) Utah Rules of Civil Procedure and awarded to the defendant, Travelers Indemnity Company, summary judgment dismissing the plaintiff's complaint against it with prejudice and upon the merits of the complaint. (R. 111-112)

RELIEF SOUGHT ON APPEAL

Defendant-respondent, Travelers Indemnity Company, seeks affirmation of the summary judgment of the District Court entered in its favor.

STATEMENT OF FACTS

As to the joined issues between Travelers Indemnity Company, hereinafter referred to as Travelers, and Diamond T Utah, Inc., hereinafter referred to as Diamond T, there is no material issue of fact concerning the issue of coverage of risks provided in the insurance policy. In the District Court, Travelers' motion to dismiss which was treated as a motion for summary judgment under Rule 12(b) Utah Rules of Civil Procedure, and Diamond T's motion for summary judgment placed the construction of the

written contract of insurance before the Court. That contract of insurance and the depositions of O. J. Wilkinson, the president and owner of all of the shares of stock, except for "qualifiers for incorporation" (R-152), of the plaintiff corporation, contain all of the agreements upon which the plaintiff relies by stipulation between Diamond T and Travelers and by the order of the District Court entered upon said stipulation (R-38). Between Diamond T and Travelers the only disputed issue of fact is the value of the tractor-trailer. Diamond T cannot create an issue of fact concerning the coverage of the contract of insurance between Diamond T and Travelers on appeal which is the gravamen of Diamond T's complaint against Travelers. *Mastic Tile v. Acme Distributing Co.*, 15 U.2d 136, 389 P.2d 56 (1964); *Richards v. Anderson*, 9 U.2d 17, 337 P.2d 59 (1959).

Travelers does not disagree with the facts in the statement of facts in Diamond T's brief. Travelers submits that Diamond T does not limit its argument to its statement of facts, the record in the case at bar and the pleadings in this case. All of the declarations of purported facts by Diamond T in its argument must not be considered as material issues of fact under this Court's decision in *Mastic Tile v. Acme Distributing Co.* and *Richards v. Anderson*, supra. For the Court's convenience Travelers submits further uncontested material facts omitted from Diamond T's brief with a restatement of the facts in appellant's brief as necessary for clarity.

Diamond T and Travelers entered into a contract of insurance. (R-181) The contract of insurance contained an "automobile dealer's endorsement". (R-184) The endorsement in part provides:

"It is agreed that such insurance as is afforded by the policy applies subject to the following provisions:

"1. *Property Covered*—The policy covers *automobiles (a) consigned to or owned by the insured and held for sale or used in the insured's business as an automobile dealer including repair service or as demonstrators, exclusive of automobiles leased or rented to others, and automobiles sold by the insured under bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance; . . .*" (Emphasis added)

"INTERESTS AND AUTOMOBILES INCLUDED

	New Automobiles	Used Automobiles
Insured's Interest Only	No	Yes"

The policy then describes the sales locations of the dealers. The policy provides certain conditions for "unnamed locations". Attached to the "automobile dealer's endorsement" is an automobile dealer's "drive-away" collision coverage endorsement which places certain limitations and conditions upon the transportation of the automobiles covered by the policy. (R 184-186)

The policy did not become effective until January 27, 1961, which is the first day of the policy period defined in paragraph VII as follows:

"This policy applies only to direct and accidental losses to the automobile which are sustained during the policy period . . ." (R. 181, 182)

Before the commencement of the policy period, Dia-

mond T sold a 1952 trailer and a 1953 tractor to David Scott under a written conditional sales contract dated the 23rd day of January, 1961. (R-146)

On the same day, January 23, 1961, Diamond T assigned its interest in the contract to Pacific Finance Company, hereinafter called Pacific. (R-148)

Pacific and Diamond T had an agreement (R-148) wherein it was provided:

“ . . . I (Diamond T) agree that if the assignee shall repossess said property for failure of the purchaser to perform any of the conditions of said contract (conditional sales contract), and shall deliver said property to my (Diamond T's) place of business within (90) days after the due date of the oldest unpaid installment . . . per contract, I will pay the balance remaining under said contract within thirty (30) days after delivery, or on demand at election of assignee. . . . I (Diamond T) understand that title to said property remains in the assignee (Pacific) until the contract balance shall be fully paid . . . ”

In the conditional sales contract and in an agreement to furnish insurance, Diamond T, Pacific and the conditional purchaser agreed to cause insurance covering “fire, theft and physical damage” to the tractor and trailer. (R-146, 147, 148) In the conditional sales contract the purchaser, Scott, promised to cause insurance coverage for said property damage or theft. (R-146) The insurance coverage provided by the conditional sales contract was purchased. (R-22, 23) That insurance against fire, theft and physical damage was not in force at the time of loss because of non-payment of premium. (R-23)

The conditional purchaser, David Scott, was in default on the conditional sales contract on or about June 16, 1961. On that date Pacific took possession of the tractor-trailer at Madison, Wisconsin. Pacific caused the tractor-trailer to be parked outside a garage in Madison. Scott, the conditional purchaser, found the tractor-trailer. Taking advantage of an opportunity, he took possession of it. A few days later the tractor-trailer was found at the location of an accident in which it had been involved. (R-12, 22 and 23)

Concerning the "repossession" of the tractor-trailer by Pacific and in reference to the "assignment agreement" between Pacific and Diamond T, Mr. O. J. Wilkinson testified at his deposition that Pacific was vested with legal title and David Scott was vested with equitable title up until the time the tractor-trailer was involved in the accident which caused the damage for which Diamond T complains. He said:

"And they (Pacific Finance) secured the truck from a driver, repossessed it from his driver. (R163, line 6)

"The following day he (David Scott, purchaser) called me. (R-163, line 12)

"As I remember he did not have enough money to pay it up to date in full and so I told him he would have to go to Pacific Finance and work out whatever he wanted to do with them and that would be the only way that the truck could be released, that I would not release it and could not release it, and that it was up to Pacific Finance to handle it. (R-163 and 164)

"They (Pacific Finance) just called me and told me they had picked it (tractor-trailer) up and it was

stored in—I don't remember, some little town in Wisconsin . . . that their office (Pacific's) was mailing the keys and all, their storage receipt and everything to them (Pacific in Salt Lake City) here. And I told them, well, when they (Pacific) got that then I would go ahead and make arrangements to have it picked up.

"Q. After . . . the, truck had been taken, . . . do you know if Pacific Finance took any further steps to locate the units?

"A. Yes . . ." (R-165)

Diamond T claims the loss of the tractor-trailer sold by Diamond T under a conditional sales contract to David Scott was covered by Travelers' policy (R-11-14).

ARGUMENT

POINT I

THE CONTRACT OF INSURANCE BETWEEN TRAVELERS AND DIAMOND T DID NOT COVER THE LOSS OF THE TRACTOR-TRAILER BECAUSE THE TERMS OF SAID POLICY EXPRESSLY EXCLUDED "AUTOMOBILES . . . SOLD BY THE INSURED UNDER . . . CONDITIONAL SALE"

The provision in Travelers' "automobile dealer's endorsement" which provided:

"1. Property Covered. The policy covers automobiles * * * * exclusive of automobiles * * * * sold by insured under * * * conditional sale."

excluded coverage of the tractor-trailer sold to David Scott under the conditional sales contract.

The language of the clause in Travelers' policy has been construed in several decisions including two cases involving repossessed automobiles. 23 ALR2d 796, 3 ALR2d Later Case Service 578 and page 62, 1967 Supplement.

In *Hudiberg Chevrolet, Inc. v. Globe Indemnity Co.*, (Texas) 383 S.W.2d 65 (1964) the same language in an automobile dealer's policy was an issue. In that case the plaintiff, automobile dealer, had possession of a truck which had been repossessed from the dealer's conditional purchaser. The dealer had assigned its interest in the truck under the conditional sales contract to GMAC shortly after the conditional sale. GMAC had repossessed the truck from the conditional purchaser and delivered it to the dealer. The conditional purchaser stealthily took possession of the truck from the dealer by use of his extra set of keys. The dealer apparently had a dealer's agreement with GMAC. The dealer paid GMAC the balance the conditional purchaser owed on the contract. In reversing the trial court's judgment for the plaintiff the Court said:

"Vehicles insured . . . (by the policy) were those '(a) consigned to or owned by the insured and held for sale or used in the insured's business as an automobile dealer * * * * exclusive of automobiles * * * sold by the insured under * * * mortgage, conditional sale * *'.

* * * *

"(T)he truck did not * * become in any sense a vehicle 'consigned to or owned by the insured' much less one which was 'held for sale or used in the insured's business'. Furthermore, the vehicle in question was encumbered . . . The insured's loss was not

contemplated to be covered nor was it the subject of insurance afforded by the policy."

In *Meyer v. Hardware Mutual Casualty Co.* (Texas) 383 S.W.2d 625 (1964) the contract of insurance between the plaintiff and defendant contained the same language as the contract of insurance in the case at bar. It was an automobile dealer's policy. The Court found that the dealer had sold the automobile under a conditional sales contract. The conditional purchaser damaged the automobile. The dealer repossessed the automobile, repaired it and sold it to another. The dealer claimed that he was entitled under the insurance policy to recover the amount of damage to the automobile. The court held that the automobile was sold under a conditional sale and thereby excluded from coverage of the dealer's policy.

In *Ohio Security Insurance Co. v. Buckeye Union Casualty Co.* (Ohio) 178 N.E.2d 817 (1962) two insurance carriers sought a declaratory judgment concerning their liabilities under insurance policies. The defendant, Buckeye Union Casualty Company, had an automobile dealer's contract of insurance with an automobile dealer named Midtown Motors. The language of the exclusion of property covered in that policy was the same as the language in the Travelers' policy in the case at bar. Midtown Motors and the purchaser had executed a note and mortgage for the purchase of the automobile. The purchaser was given possession of the automobile. Midtown Motors had not complied with Ohio's Automobile Title Act for divesting itself of title. The automobile sustained damage while in possession of the purchaser. The Court held that Buckeye Union Casualty Insurance Company was not liable on its dealer's policy and said:

“(T)o hold the automobile was not sold under mortgage within the meaning of the language of the exclusion clause would just simply be contrary to common right and reason.”

The exclusion from coverage of the tractor-trailer sold by Diamond T under a conditional sale to David Scott is consistent with all of the provisions of the “automobile dealer’s endorsement”.

The language of the automobile dealer’s endorsement compels the conclusion that the parties to the insurance contract contemplated that the policy covered loss by physical damage and theft of automobiles while “*held for sale*” by the dealer, the insured.

The coverage commenced when the automobile dealer took possession of automobiles as consignee or purchaser and owned and held the automobiles for sale to others. Vol. 11 Couch on Insurance 2d §42:238 p. 75. The protection against loss continued until the dealer sold and delivered possession to a purchaser whether the sale was absolute or conditional. 23 ALR2d 796; 11 Couch on Insurance 2d §42:238 p. 74.

The condition precedent to coverage of the risk of loss of an automobile under the insurance contract was that the automobile be “held for sale” by the dealer. The condition precedent of possession by the dealer, insured, was limited to two categories of possession by the dealer, to-wit: (1) possession as consignee, or (2) possession as owner even though the automobile was subject to a “trust agreement, bailment, lease, conditional sale, purchase agreement, mortgage” between the dealer and the person, firm or corpora-

tion from whom the automobile dealer may have purchased the automobile or with whom the automobile dealer may have financed his purchase of the automobile.

The requirements in the policy for the insured's designating locations of the places the automobiles are held for sale, for permitting the insurer to inspect the insured's books and for limiting the conditions and distances of transporting the automobiles, emphasize the kind of coverage the automobile dealer was purchasing and the basis of the premium charge he paid. They were consistent with coverage of automobiles "held for sale" but not consistent with automobiles sold and delivered to a purchaser.

There was nothing in the insurance policy which indicated that the parties contemplated that the tractor-trailer sold to David Scott before the commencement of the policy period was "property covered" by the policy. The decisions construing the language of a "dealer's policy" under circumstances similar to those in the case at bar unanimously hold that a policy with the same provisions as Travelers' policy in the case at bar did not cover automobiles as the tractor-trailer sold to David Scott.

In Diamond T's brief to this Court some hornbook phrases concerning the interpretation of insurance contracts are paraphrased. Diamond T fails to apply the undisputed facts to those principles. In this case the ordinary and natural meaning of the language used should not be perverted or twisted into an unnatural or exceptional meaning merely to cause coverage. Vol. 3 Couch §15:49 p. 738. Especially when eradication of the exclusion of automobiles sold and in possession of persons other than the insured would obviously

have escalated the amount of premium at the time the parties entered into the insurance contract.

POINT II

TRAVELERS' CONTRACT OF INSURANCE WITH DIAMOND T ONLY COVERED AUTOMOBILES "CONSIGNEE TO OR OWNED BY THE INSURED AND HELD FOR SALE." DIAMOND T DID NOT HAVE ANY POSSESSION OF OR INTEREST IN THE TRACTOR-TRAILER WHEN IT WAS RE-POSSESSED BY PACIFIC OR WHEN THE TRACTOR-TRAILER SUSTAINED DAMAGE.

O. J. Wilkinson, president and practically sole owner of Diamond T testified at his deposition that when Diamond T sold the tractor-trailer to David Scott under the conditional sales contract, Diamond T assigned all of its seller's interest in said contract to Pacific. After Diamond T's complete divestiture of any interest in the vehicle, Pacific received all of the payments Scott made under the conditional sales contract. (R-146, 148, 161) Pacific repossessed the tractor-trailer as holder of legal title. Pacific did not reassign the seller's interest in the conditional sales contract to Diamond T nor did Diamond T obtain possession of the tractor-trailer prior to its damage. (R-164)

After Diamond T assigned all of its interest in the conditional sales contract it had no interest in the property. In *American States Insurance Co. v. White, et al*, 341 Ill. App. Ct. Rpts. 422, 94 N.E.2d 95 (1950) the plaintiff insurance company claimed that it had no liability under its insurance

policy on the ground that the insured was not the owner of the automobile. In considering the effect of a bill of sale by a conditional seller executed after the conditional seller had assigned its interest in a conditional sales contract to GMAC for the same automobile the Court reasoned:

“Furthermore, if the alleged bill of sale were executed after Rock River Motors (conditional seller) assigned the conditional sales contract to GMAC, it was, a fortiori, a nullity, for then Rock River Motors (conditional seller) would not have even had the right to receive the balance of payment for the car.”

This Court has decided in *Stains v. Peterson*, 74 U. 256, 279 P. 53 (1929) and in *Harrison v. Otto Securities Co.*, 70 U. 11, 257 P. 677 (1927), that an assignment of the conditional seller's interest in a conditional sales contract transfers all of the conditional seller's rights in the property sold under the conditional sales contract. After the assignment of the conditional seller's interest the rights in the property are exclusively vested in the conditional purchaser and the assignee of the conditional seller.

The agreement between Pacific and Diamond T did not give Diamond T any interest in the property before its loss. Pacific may have elected to proceed under several conditions of the contract, none of which would vest an interest in the tractor-trailer in Diamond T before the loss for which plaintiff complains. Pacific and Diamond T expressly agreed in their agreement as follows:

“I (Diamond T) understand that title to said property remains in the assignee (Pacific) until the contract balance shall be fully paid. . . .”

It is undisputed that Diamond T did not pay the contract balance to Pacific nor have possession of the tractor-trailer before the accident in which the vehicle was damaged.

In its brief Diamond T irrelevantly and erroneously argues that it had an insurable interest in the tractor-trailer. The issue in this case is whether that interest, if any, was insured.

The decisions cited by the attorney for Diamond T in its brief have no relationship whatsoever to the issues at bar. In *Fish v. Connecticut Fire Insurance Co.* (Wisc.) 5 N.W.2d 779 (1942) the policy of insurance had different provisions from the one in the case at bar and the plaintiff, insured, owned the chattel. In *Pratt v. Hanover Fire Ins. Co.* (R.I.) 146 A. 763 (1929) the insurance policy insured the conditional vendor, the conditional vendee and the assignee of the conditional vendee. In that case the insurance policy specifically provided that all three were named insureds. The provisions of the policy in that case were completely different from the conditions in the policy in the case at bar. The policy in that case was the kind of policy Diamond T, Pacific and Scott agreed to furnish, and did purchase; but they permitted it to lapse for nonpayment of premium before the loss. In *Union Insurance Society v. Sudduth* (Ala.) 103 S. 845 (1925) the record revealed that the conditional seller was named in the "encumbrance" clause of a policy which had completely different provisions from the dealer's policy in the case at bar. In *Hassett v. Pennsylvania Fire Insurance Co.* (Wash.) 273 P. 745 (1929) the plaintiff, insured, purchased a policy insuring him against "all direct loss or damage which he may sustain by the disposal or concealment of said automobile by the said vendee with intent to defraud the said

vendor" which is apparently what caused the loss of the property sold to said vendee in that case. The decisions in *Germania Fire Insurance Co. v. Turley*, (Ky.) 179 S.W. 1059 (1915) and *Home Insurance Co. v. Chowning* (Ky.) 233 S.E. 731 (1921) involved fire insurance policies covering damage to real property. In both of those cases the insurance policies were completely different from the insurance policy in the case at bar.

The appellant's attorney in Diamond T's brief does cite a case which is almost in point and which is helpful to the defendant, Travelers. That decision is *Fountain v. Importers and Exporters Insurance Co. of New York*, (Wisc.) 252 N.W. 569 (1934). In that case a conditional seller of automobiles assigned his interest in conditional sales contracts after the conditional purchasers took possession of the automobiles sold under the contracts. The conditional seller, Fountain, had a contract of insurance with the defendant insurance company which expressly covered automobiles subject to an equitable mortgage. Conditional purchasers of some automobiles had apparently defaulted on their contracts of conditional sale. The automobiles had been repossessed and they were held for sale on Fountain's lot. A fire destroyed the automobiles. The trial court found that Fountain, the automobile dealer, had an insurable interest in the repossessed cars. The Court reversed the judgment of the trial court. In connection with the automobile dealer's insurable interest, the Court said:

"As to the . . . repossessed cars, we are of the opinion that, under the evidence as it stands, it does not appear that Fountain (auto dealer) had an insurable interest therein. * * * * Fleming (assignee)

kept an account respecting each of the cars (which) shows that four of the repossessed cars were settled for and paid for by Fountain (dealer) when they were sold. From this alone the inference would be that Fountain had no further interests in a car after it was sold, and Fleming's (assignee's) charge against him therefor was fully paid. The ownership in a car after it was sold was no longer in Fountain (dealer), but in the purchaser. Fleming's (assignee's) lien thereon remained, for he held the sale papers and kept the certificate of title in his possession after having the sale recorded in the Secretary of State's office, and the right to repossess it for breach of conditions of sale was in Fleming (assignee), not Fountain (dealer)."

Diamond T did not have an insurable interest in the tractor-trailer purchased by David Scott under the *Fountain* decision cited by appellant in its brief. The record and decisions cited by Travelers compel the conclusion that Diamond T did not have an interest in the tractor-trailer sold to David Scott after its assignment to Pacific. Diamond T had completely divested itself of any interest in that property. It did not become vested with any interest before the time of loss. And, more significantly, the tractor-trailer was not an "automobile consigned to or *owned by the insured and held for sale*" as proscribed by the insurance policy.

POINT III

THE TRACTOR-TRAILER PURCHASED BY DAVID SCOTT WAS SUBJECT TO THE CONDITIONAL SALES CONTRACT AT THE TIME OF THE ACCIDENT IN WHICH THE TRACTOR-TRAILER SUSTAINED DAMAGE AND WITHIN THE EXCLU-

SION OF "AUTOMOBILES SOLD UNDER CONDITIONAL SALE" IN TRAVELERS' POLICY.

The conditional sales contract under which Diamond T sold the tractor-trailer to David Scott provided for seller's remedies in case of default by the conditional purchaser. The "seller" at the time of loss was Pacific as assignee of all of the Diamond T's rights in the contract. (R-146) Under the contract Pacific could repossess the chattel and sell the chattel at a public or a private sale. It could apply the proceeds of the sale on the balance owing on the contract and claim any deficiency from the conditional purchaser or pay to the purchaser the amount of the proceeds from said sale in excess of the balance owing on the contract. Those provisions gave the purchaser an interest which has not terminated. Correlative to the seller's contract right to repossess and sell the chattel is the duty to obtain a reasonable value for the chattel which must be applied on the balance owing by the purchaser.

The conditional sales contract permitted the purchaser to pay the entire balance owing which would vest him with both legal and equitable title in the chattel and divest any right of Pacific in the chattle.

None of the rights of Pacific and Scott were extinguished prior to the accident in which the tractor-trailer sustained damage.

In *Jones v. Brown*, (Ga.) 134 S.W.2d 440 (1963) the legal title holder repossessed the chattel from the plaintiff and sold it to a third party. The legal title holder subsequently accepted a late payment from the plaintiff. After the late payment was accepted, plaintiff sued for possession

of the chattel. In discussing the rights of the equitable owner, plaintiff, under the contract the Court said:

"The plaintiff at the time of the institution of this suit did not have legal title, but she did have a special property interest entitling her to pursue the action, which was the value of the goods over and above the amount of the debt. She did not have a right to recover the property itself without paying the debt (which she could have done by a prior tender of the amount due, or during the trial at the time of electing a property judgment) or she could recover on the basis of the special property right by electing a money judgment for the difference. * * * *

* * * *

"The owner of property who conveys by a bill of sale to secure a debt owing by him to a creditor is in the same legal situation as one who purchases property from a vendor who retains title until the purchase price is paid; in both situations the right of possession depends upon compliance with the terms of the contract."

In an action to recover a deficiency on a conditional sales contract after sale of the repossessed automobile sold under the contract this Court decided in *Jensen's Used Cars v. Rice* 7 U.2d 276, 323 P.2d 259 (1958) that a contract as the conditional sales contract in the case at bar continues until the judgment for deficiency and other contractual obligations expressed in said contract unless the parties agree upon a modification prior to judgment.

The insurance policy in the case at bar excluded automobiles sold by conditional sale. The conditional sales contract for the tractor-trailer in the case at bar continues to be

binding upon the parties to it and their assignees. The tractor-trailer was not property covered by the insurance policy at the time of its loss.

POINT IV

DIAMOND T EITHER ASSIGNED ITS INTEREST IN THE CONDITIONAL SALES CONTRACT TO PACIFIC OR IT DID NOT ASSIGN ITS INTEREST. IF IT DID NOT ASSIGN ITS INTEREST THERE WAS NO REPOSSESSION. IF THERE WAS NO REPOSSESSION, THE TRACTOR-TRAILER WAS STILL UNDER THE CONDITIONAL SALE AT THE TIME OF LOSS. IF IT ASSIGNED ITS INTEREST IT HAD NO INTEREST. IN EITHER EVENT, TRAVELERS' POLICY DID NOT COVER THE LOSS.

Diamond T is caught in a dilemma. If it did not assign its interest in the conditional sales contract to Pacific Finance thereby causing Pacific to be vested with legal title, Pacific had no right to receive the payments from David Scott and it had no right to repossess the tractor-trailer. The repossession by Pacific would not have been a valid repossession. If there were no repossession David Scott would still be the conditional purchaser entitled to drive it away from the place it was parked by Pacific in Madison, Wisconsin. The Travelers' policy would not cover the risk of loss of the tractor-trailer because the tractor-trailer was sold under a conditional sales contract as provided in the exclusion of "property covered" phrase in the policy. On the other hand, if Diamond T assigned its interest in the tractor-

trailer to Pacific, Diamond T did not have any interest in the tractor-trailer at the time of loss. All of the decisions are unanimous.

In *Hudiburg Chevrolet, Inc. v. Globe Indemnity Co.* (Tex.) 383 S.W.2d 65 (1964) the seller assigned all of his interest in an automobile to the finance company, GMAC, which repossessed the automobile from the purchaser and delivered it to the dealer from whose possession the purchaser surreptitiously took the automobile and damaged it. The dealer paid GMAC the balance owing on the contract. The Court held that a "dealer's policy" only insured vehicular property and the dealer had no interest in the lost automobile. The cases annotated at 23 ALR2d and 3 ALR2d Later Case Service p. 578 unanimously hold that an insurance policy as Travelers' policy does not cover property sold under conditional sale.

POINT V

DIAMOND T'S UNCONDITIONAL GUARANTEE WAS A CONTRACTUAL LIABILITY NOT COVERED BY TRAVELERS' "AUTOMOBILE DEALER'S ENDORSEMENT."

The record clearly indicates that the parties in this litigation did not contemplate that Travelers' "dealer's endorsement" covered any liability of Diamond T on its unconditional guarantee of its conditional purchaser's obligations to its assignee, Pacific. Pacific and Diamond T made provision for other insurance covering sold automobiles in which Pacific and possibly Diamond T would have been named as a loss payee in the policy. (R-147) There was such

a policy covering the tractor-trailer but it lapsed prior to the loss.

Under Travelers' "dealer's endorsement" the only coverage provided Diamond T was loss of an interest in automobiles which it "*held for sale as owner*" and which had not been sold and delivered under a contract of conditional sale. The fact that the insured, Diamond T, had contractually obligated itself to make payment to Pacific if a conditional purchaser failed to make payment to Pacific had no effect on the liability of Travelers under the policy. Travelers insured Diamond T against loss of property not against its contractual liability to Pacific. *Hudiburg Chevrolet, Inc. v. Globe Indemnity (Tex.)* 383 S.W.2d 65 (1964)

CONCLUSION

Travelers' "dealer's endorsement" and policy did not insure Diamond T against the loss of the tractor-trailer it sold under conditional sale to David Scott. Summary judgment for Travelers against Diamond T should be affirmed.

Respectfully submitted,
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